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Attorneys for Plaintiff
 MESA SAFE COMPANY, INC.

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 SOUTHERN DIVISION

MESA SAFE COMPANY, INC., a
 California corporation,

Plaintiff,

vs.

AMAZON.COM SERVICES, INC., a
 Delaware corporation,

Defendant.

) Case No.: 8:18-cv-01247-JVS-ADS
)
) **FIRST AMENDED COMPLAINT**
) **FOR:**
) **1. BREACH OF ORAL**
) **CONTRACT**
) **2. OPEN BOOK ACCOUNT**
) **3. ACCOUNT STATED**
) **4. FRAUD AND DECEIT**
) **(PROMISE MADE WITHOUT**
) **INTENTION TO PERFORM)**
) **5. GOODS SOLD AND**
) **DELIVERED**

COMES NOW Plaintiff Mesa Safe Company, Inc., and alleges as follows:

JURISDICTION

1. On or about August 20, 2018, defendant Amazon.com Services, Inc., removed this action from Orange County Superior Court (where it was filed as Civil Action No. 30-2018-00998821-CU-BC-CJC). Defendant Amazon.com Services, Inc., purport to invoke the court's jurisdiction under the provisions of 28 U.S.C. §§ 1332 (a)(1) on the claim that it is a civil action against a citizen of a different state. Defendant Amazon.com Services, Inc., further invokes this court's jurisdiction under 28 U.S.C. § 1332 and 28 U.S.C. § 1441(b) on the grounds that complete diversity of citizenship exists among the parties and the matter in

1 controversy exceeds the sum of \$75,000.00.

2 **PARTIES**

3 2. Plaintiff is, and at all times herein mentioned was, a California
4 corporation engaged in interstate business.

5 3. Plaintiff is informed and believes, and thereupon alleges, that
6 Defendant, AMAZON.COM SERVICES, INC., is and was a foreign corporation
7 organized and existing under the laws of the State of California.

8 4. At all times herein mentioned, each of the Defendants was the agent,
9 employee, and/or partner of each of the remaining Defendants and, in doing the
10 things herein complained of, each Defendant was acting with the scope of such
11 agency, employment and/or partnership and with the consent of their
12 Co-defendants.

13 5. At all times herein mentioned, Defendants, and each of them,
14 approved, authorized, directed and ratified the acts of each and every other
15 Defendant in doing the things hereinafter alleged.

16 **FIRST CAUSE OF ACTION**

17 **(For Breach of Oral Contract against All Defendants)**

18 6. Plaintiff hereby repeats, repleads and realleges Paragraphs 1 through
19 5 herein, inclusive, and incorporates said Paragraphs by reference as though fully
20 set forth herein.

21 7. Plaintiff alleges that on or about March 8, 2016, an oral agreement
22 was made between Plaintiff and Defendants. The terms of said agreement were
23 that Plaintiff sold and delivered safes and merchandise to Defendants. Defendants
24 promised to pay Plaintiff for all goods sold and delivered. This agreement was
25 both oral and confirmed in writing by email from hi-imports@amazon.com, which
26 email is set forth the terms of the oral contact. A true and correct copy of the
27 March 8, 2016 email is attached hereto as Exhibit "A" and is incorporated herein
28 by this reference as though set forth in full.

1 8. Within the last two (2) years, Defendants, and each of them, breached
2 the oral agreement by failing to pay for goods sold and delivered which had been
3 provided at their special instance and request. Demand for the outstanding
4 balance owed of approximately \$253,797.76 was made upon Defendants, and each
5 of them. Defendants, and each of them, have failed and refused and continue to
6 fail and refuse to pay all or any part of the remaining balance due.

7 9. Plaintiff has performed all obligations to Defendants, except those
8 obligations Plaintiff was prevented or excused from performing.

9 10. Plaintiff suffered damages caused by Defendants', and each of their,
10 breach of the oral agreement in the sum of approximately \$253,797.76 which is
11 the outstanding balance and reasonable value now due, owing and unpaid, despite
12 Plaintiff's demands therefor, plus prejudgment interest thereon at the rate of ten
13 percent (10%) per annum from the date of the breach.

14 **SECOND CAUSE OF ACTION**

15 **(For Open Book Account against All Defendants)**

16 11. Plaintiff hereby repeats, repleads and realleges Paragraphs 1 through
17 10 herein, inclusive, and incorporates said Paragraphs by reference as though fully
18 set forth herein.

19 12. As an alternative and cumulative remedy, Plaintiff alleges that
20 Defendants, and each of them, became indebted to Plaintiff within the last four
21 years on an open book account for safes and materials rendered at the special
22 instance and request of Defendants and for which Defendants promised to pay
23 Plaintiff.

24 13. Although demand for payment of the sum of \$253,796.76 has been
25 made upon Defendants, and each of them, Defendants, and each of them, have
26 failed and refused and continue to fail and refuse to pay all or any part of said sum.
27 The sum of \$253,796.76 remains now due, owing and unpaid from Defendants to
28 Plaintiff, together with interest thereon at the rate of ten percent (10%) per annum.

1 14. Plaintiff is entitled to attorney fees pursuant to California Civil Code
2 Section 1717.5, in a sum according to proof.

3 **THIRD CAUSE OF ACTION**

4 **(For Account Stated against All Defendants)**

5 15. Plaintiff hereby repeats, repleads and realleges Paragraphs 1 through
6 14 herein, inclusive, and incorporates said Paragraphs by reference as though fully
7 set forth herein.

8 16. As an alternative and cumulative remedy, Plaintiff alleges that
9 Defendants, and each of them, became indebted to Plaintiff because an account
10 was stated in writing by and between Plaintiff and Defendants in which it was
11 agreed that Defendants were indebted to Plaintiff for safes and merchandise in the
12 sum of \$253,796.76.

13 17. Although demand for payment of the sum of \$253,796.76 has been
14 made upon Defendants, and each of them, Defendants, and each of them, have
15 failed and refused, and I continue to fail and refuse to pay all or any part of said
16 sum. The sum of sum of \$253,796.76 remains now due, owing and unpaid from
17 Defendants to Plaintiff, together with interest at the rate of ten percent (10%) per
18 annum.

19 **FOURTH CAUSE OF ACTION**

20 **(For Fraud and Deceit - Promise Made Without Intention to Perform -**
21 **against All Defendants)**

22 18. Plaintiff hereby repeats, repleads and realleges Paragraphs 1 through
23 17 herein, inclusive, and incorporates said Paragraphs by reference as though fully
24 set forth herein.

25 19. At the time Defendant made the promise to Plaintiff, Defendant had
26 no intention of performing the oral contract on those terms.

27 20. The promise was made by Defendant with the intent to induce
28 Plaintiff to enter into the oral contract and sell safes to Defendant.

1 21. Plaintiff, at the time this promise was made and at the time Plaintiff
2 took the actions herein alleged, was ignorant of Defendant's secret intention not to
3 perform on the oral contract on the promised terms but instead to create an
4 accounting scheme to deduct monies from the amount owed by Defendant to
5 Plaintiff on terms that were never agreed to in the oral contract and not expressed
6 in Exhibit A and Plaintiff could not, in the exercise of reasonable diligence, have
7 discovered Defendant's secret intention. In reliance on the promise of Defendant,
8 Plaintiff entered into the oral contract. If Plaintiff had known of the actual
9 intention of Defendant, Plaintiff would not have taken such action.

10 22. Defendant failed to abide by the oral contract terms set forth in
11 Exhibit A and deducted approximately \$250,000.00 from the amount owed to
12 Plaintiff.

13 23. As a proximate result of the fraudulent conduct of Defendant as
14 herein alleged, Plaintiff was induced to enter into the oral contract in an attempt to
15 derive a profit from the oral contract and sold and delivered to Defendant safes
16 and merchandise but Plaintiff has not received its expected monies and has receive
17 no profit or other compensation for its time and energy, by reason of which
18 Plaintiff has been damages in the approximate sum of \$250,000.00 or such other
19 sum according to proof at time of trial.

20 24. The aforementioned conduct of Defendant was an intentional
21 misrepresentation and deceit by Defendant with the intention on the part of
22 Defendant to deprive Plaintiff of property or legal rights or otherwise causing
23 injury and was fraudulent conduct that subjected Plaintiff to a cruel and unjust
24 hardship in conscious disregard of Plaintiff's rights, so as to justify an award of
25 exemplary and punitive damages.

26 ///

27 ///

28 ///

FIFTH THIRD CAUSE OF ACTION

(For Good Sold and Delivered against All Defendants)

25. Plaintiff hereby repeats, repleads and realleges Paragraphs 1 through 24 herein, inclusive, and incorporates said Paragraphs by reference as though fully set forth herein.

26. Within the last four (4) years, at Orange, California, Defendant became indebted to Plaintiff in the sum of \$1,259,256.27 for goods sold and delivered to Defendant.

27. Plaintiff repeatedly demanded payment from Defendant. The last demand was made on April 11, 2018.

28. Defendant has paid only the sum of \$1,005,459.51 to Plaintiff, leaving a balance due of \$253,796.76, with interest on that amount at the rate of rate of ten percent (10%) per annum from August 17, 2017.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

ON THE FIRST CAUSE OF ACTION

1. For the principal sum of \$253,796.76;
2. For interest at the rate of ten percent (10%) per annum from the date of the breach;

ON THE SECOND CAUSE OF ACTION

3. For the principal sum of \$253,796.76;
4. For interest at the rate of ten percent (10%) per annum;
5. For reasonable attorneys fees pursuant to California Civil Code Section 1717.5 in a sum according to proof;

ON THE THIRD CAUSE OF ACTION

6. For the principal sum of \$253,796.76;
7. For interest at the rate of ten percent (10%) per annum;

///

1 ON THE FOURTH CAUSE OF ACTION

2 8. For General Damages in a sum according to proof at time of trial;

3 9. For Special Damages in a sum according to proof at time of trial;

4 10. For interest at the rate of ten percent (10%) per annum;

5 11. For punitive damages in an amount appropriate to punish Defendant
6 and deter others from engaging in similar conduct;

7 ON THE FIFTH CAUSE OF ACTION

8 12. For General Damages in a sum according to proof at time of trial;
9 For the principal sum of \$253,796.76;

10 13. For Special Damages in a sum according to proof at time of trial;

11 14. For interest at the rate of ten percent (10%) per annum;

12 ON ALL CAUSES OF ACTION

13 15. For cost of suit incurred herein; and

14 16. For such other and further relief as this Court may deem just and
15 proper.

16
17 Dated: November 26, 2018

NIALIS LAW GROUP, APLC

18 /s/

19 By: _____
20 MARK NIALIS
21 Attorney for Plaintiff
22 MESA SAFE COMPANY, INC.

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FW: Amazon Direct Import Opportunity - Vendor Action Required...

Subject: FW: Amazon Direct Import Opportunity - Vendor Action Required - MESBC

From: "Devin - Mesa" <devin@mesasafe.com>

Date: 3/9/2016 8:31 AM

To: <sales@securitybase.com>

George,

Amazon is requesting direct containers from China, catch is at what costs and payment terms extended 30 days. I think we should have a conversation about this and get on the phone with Brendan and Steve to discuss the program.

Thank you,

Devin Rohrbacker
VP Sales
Mesa Safe Company
t:800-490-5624 xt 123
f:714-627-4016



From: hi-imports@amazon.com [mailto:hi-imports@amazon.com]

Sent: Tuesday, March 08, 2016 4:59 PM

To: devin@mesasafe.com; pamela@mesasafe.com

Subject: Amazon Direct Import Opportunity - Vendor Action Required - MESBC

Dear Vendor Partners,

As we continue to expand your business on Amazon's platform, we identify new ways in which we can fulfill customer demand in a consistent and low-price manner. An initiative that we are focusing on expanding in 2016 is our Direct Imports program. Our Direct Imports program allows us to take possession of goods sold at the port of origin in an effort to decrease the amount of touches on an item from manufacturing to arrival at a customer's doorstep.

We have selected you as a top vendor to partner with as we continue to expand our program. Getting started is easy and co-op on Direct Import orders is 0%! To get started all we need are a few simple inputs:

- **ASINs:** As we ramp up, we prioritize top selling products with stable demand and large cube volume
- **Dead-net-costs:** Best cost with no backend funding or allowance included
- **Preferred Incoterms:** Amazon can now support both FOB (vendor arranges transit to port) and FCA (Amazon arranges transit to port) incoterms
- **Vendor Lead Time:** Lead time from when orders are placed until freight is dropped at the port (FOB) or until freight is ready to be picked up (FCA)

FW: Amazon Direct Import Opportunity - Vendor Action Required...

- **Port Of Origin:** Amazon's preferred freight forwarder operates out of most major ports around the globe and can quickly set up operations in new locations to meet your needs. Unique vendor codes will be created for each port of origin that you ship out of.
- **Minimum Order Quantities:** Minimum required quantity of product for each order
- **Containerization or Consolidation:** Amazon prefers full mixed item containers, however consolidation services are available
- **HTS codes:** Harmonized tariff schedule codes for your selected ASINs
- **Factory:** If you require specific orders for each factory that you source from, please denote the factory by number for each item (ie. items a, b, and c are ordered from factory 1 and items d and e are ordered from factory 2). Separate vendor codes will be set up by port and factory if necessary.

More about our program:

- After your products have been onboarded, Amazon will place orders using a monthly buying cadence. Generally, orders are placed on the 10th of every month.
- Amazon has consolidation services in most major Chinese ports. If ordered quantities are not sufficient to justify full containers, we expect delivery of the goods to our consolidator facilities located near the port.
- The proposed cost is net of all charges, i.e., no additional co-op is charged on top of product costs. The quoted cost is the final cost.
- Eliminate US customs clearance and taxes by transferring ownership at the overseas port.

Please see FAQs below for additional information on the program. Once you agree to these terms, we can take the next steps to set up the items in our Direct Import program. To get started, please return the attached "direct imports onboarding spreadsheet" with the above inputs to your vendor manager with hi-imports@amazon.com cc'ed.

If you are already participating in Amazon's Direct Import program we encourage you to work with your vendor manager to expand your import selection in 2016.

We look forward to receiving your response by March 25th at the latest!

Sincerely,

Home Improvement Direct Imports Team

"Work hard. Have fun. Make history."

Amazon.com

FAQ

What should be included in the quoted price?

Please quote an import program that is Net/Net with no backend funding or allowances included. Import duty is paid on the import price so by including all backend funding and allowances in the quoted price we minimize the total duty paid. This may be different than your current domestic program which

FW: Amazon Direct Import Opportunity - Vendor Action Required...

includes COOP and other allowances.

Does current COOP apply to imports or should that be included in the quoted price?

No, the current COOP % does not apply to direct imports. The current COOP % should be taken out of the quoted import price. If this is not possible please indicate so by populating the COOP % column.

What happens to payment terms?

To account for direct import's additional transit time, Amazon adds 30 days to existing domestic vendor code payment terms.

What foreign ports are eligible?

There are very few limitations with regards to origin ports. Amazon's transportation team has facilitated transportation from over 80 foreign ports.

Can I only ship in full container quantities?

Full container quantities preferred, but not required.

When shipping less than container quantities, do vendors have to pay consolidation fees?

Vendors will be required to cover consolidation fees if quantities do not justify full containers.

What are incoterms?

Incoterms are a set of standardized rules that describe the tasks, costs and risks involved in the delivery of goods from sellers to buyers.

What are the differences between FOB and FCA incoterms?

The biggest difference between FOB and FCA incoterms is how delivery to the port of origin is arranged and paid for.

Under **FOB** Incoterms:

- **Vendor** pays for delivery to port of origin, and loading on the ocean carrier
- **Amazon** pays for international transportation, import clearance, duties & taxes and delivery to Amazon FCs
- Risk transfers to Amazon upon vendor's delivery to the carrier

Under **FCA** Incoterms:

- **Amazon** pays for delivery to port of origin, and loading on the ocean carrier
- **Amazon** pays for international transportation, import clearance, duties & taxes and delivery
- Risk transfers to Amazon upon vendor's delivery to the carrier

What is an HTS Classification and why do I need to provide it?

The harmonized tariff schedule (HTS) is a numeric directory used by importers and exporters to classify products. The classification determines the duty rate as well as import admissibility. If you are currently importing it is likely that your items are already classified. If you do not have access to HTS codes, try contacting your transportation or compliance department. Providing the HTS classification at this stage allows Amazon to quickly evaluate whether the item can be imported.

FW: Amazon Direct Import Opportunity - Vendor Action Required...

Can we floor load containers?

Yes. Floor loaded containers are preferred, however we can accommodate pallet loaded containers as well.

Will we ship to all of Amazon's FCs?

No. Amazon direct import orders are placed to just three import cross-doc FCs (Long Beach, CA, Savannah, GA, and Norfolk, VA). Upon receipt at import cross-doc FCs, inventory is then distributed throughout Amazon's FC network.

Avast logo

This email has been checked for viruses by Avast antivirus software.
www.avast.com

— Attachments: —

Direct_Import_Vendor_Inputs.xlsx

8.3 KB

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am a citizen of the United States; I am over the age of eighteen years; my business address is 500 North State College Boulevard, Suite 1200, Orange, California 92868. I am employed in the County of Orange where this mailing occurred.

On January 7, 2019, I served the foregoing document described as **FIRST AMENDED COMPLAINT FOR: 1. BREACH OF ORAL CONTRACT; 2. OPEN BOOK ACCOUNT; 3. ACCOUNT STATED; 4. FRAUD AND DECEIT (PROMISE MADE WITHOUT INTENTION TO PERFORM); and 5. GOODS SOLD AND DELIVERED** by placing a true copy thereof enclosed in a sealed envelope and/or served in the manner or manners described below to each of the parties herein and addressed as follows:

SEE ATTACHED SERVICE LIST

☐ **BY MAIL:** I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated. I am readily familiar with the firm's practice of collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business.

☐ **BY PERSONAL DELIVERY:** I caused such envelope(s) to be delivered by hand to the addressee(s) designated.

☐ **BY OVERNIGHT DELIVERY:** I caused such envelope(s) to be delivered via federal Express to the addressee(s) designated.

☐ **BY FACSIMILE:** I caused said document(s) to be transmitted to the telephone number(s) of the addressee(s) designated.

☐ **BY E-MAIL:** I caused said document(s) to be transmitted to the email addresses of the addressee(s) designated.

☒ **BY CM/ECF:** I electronically transmitted a true copy of said document(s) to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the aforementioned CM/ECF registrants.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Dated: January 7, 2019

/s/

PATTI MARTINEZ

1 Service List - Page 1

2 Re: *Mesa Safe Company, Inc., etc. vs. Amazon.com Services, Inc., etc., et al.*

3 Case No.: 8:18-cv-01247-JVS-ADS

4 Our File No.: 5285

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Attorney for Defendant
AMAZON.COM SERVICES, INC.